SEP 16 1944
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 324

HARRY M. AVANCE,

Petitioner,

vs.

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, A CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF

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JURISDICTION

Respondent forgets that certiorari implies discretion. The rigid concept of finality, now liberalized if not abandoned, ought to be sufficiently humanized to prevent the harsh and absurd results so strikingly presented here and which cannot be rectified by appeal. Otherwise, there is naught to prevent the state court from continuing to nullify indefinitely the 1939 amendment by the mere device of granting new trials, further obtaining impunity by the strategy here employed of ignoring the statute previously held unconstitutional.

Brevity will be served by selecting for differentiation the

leading F. E. L. A. case relied on by respondent, *Bruce vs. Tobin*, 245 U. S. 18. That case should be overruled or at least distinguished by reason of the following dissimilar points:

1. Unlike the case at bar the amount of recovery had not been specifically fixed and this Court could not end the litigation but in any event would have to order a new trial to determine damages. Here, concededly, after approval by the Appellate Court the amount of damages was not subject to further judicial review.

2. That case was based upon the Hazeltine decision, now overruled or definitely discarded, which formerly limited the inquiry to the face of the record and the formal character of the judgment entered.

3. Under the F. E. L. A. (45 U. S. C. A. 51) the damages sustained by the beneficiaries of Tobin had to be not only assessed in gross but also apportioned by the trial court. Mother and father would not be entitled to equal shares unless each sustained the same financial loss. The trier of fact had never considered this issue. Here the trier of fact has considered and decided every issue necessary, provided, however, that petitioner be entitled to F. E. L. A. protection as a matter of law.

Is there no constitutional question involved? A court which refuses to apply or discuss a statute directly applicable to the facts before it has most certainly rendered a decision against the validity, force and authority of that statute.

THE MERITS

Concerning petitioner's trips to Illinois, Tennessee and Arkansas (R. 12) respondent has maintained a discreet and significant silence. Likewise consigned to oblivion are the admissions that the crew before it "departed" switched one or more cars in interstate commerce (R. 28); that the crew "of which plaintiff was a member" did *haul, move, switch and transport at diverse intervals* one or more cars consigned in interstate commerce (R. 28); that "the crew of which plaintiff was a member did at diverse intervals deliver one or more cars to the Missouri-Illinois Railroad Company consigned in interstate commerce" (R. 29) (admittedly only one delivery was made that morning and the accident occurred while returning); and that persons outside of Missouri had ordered the delivery of one or more cars handled "by the crew of which plaintiff was a member prior to the time the train departed from Bismarck" (R. 29).

Apparently respondent's counsel believe there are judges and lawyers who are naive enough to assume that the Supreme Court of Illinois inadvertently overlooked these admissions. The Supreme Court said that "The admission of defendant applies to the interstate movements of the train in question during the entire day of January 17th, 1942, which does not necessarily admit such movements occurred at or prior to the time of plaintiff's accident" (R. 84). Only one admission of the five relates to the train itself. Note the Supreme Court employs the singular in referring to "the admission" (R. 84).

The work of preparing an interstate train is interstate commerce. At the time of the accident PTX-4741 was being taken by the engine from the Missouri-Illinois delivery to be placed in the train, and hence necessarily it must have been billed at the time. If PTX-4741 had not been billed,

then, like the empty coal cars, it would have been placed elsewhere in the yard but not in the train. Thus the court was grossly in error in its interpretation of the only admission of which it took cognizance.

The other four admissions were so entirely at variance with the purpose of the Supreme Court of Illinois to sabotage the 1939 amendment as to necessitate upon the part of both court and counsel a complete silence with reference to their existence.

The rule of the *Hancock* case, 253 U. S. 284, that where the facts are undisputed the question is one of law also obtains in the State of Illinois. *Benson vs. Chicago, R. I. & P. R. Co.*, 267 Ill. App. 11, aff'd 352 Ill. 195, 185 N. E. 244; *Pipal vs. Grand Trunk Western R. Co.*, 341 Ill. 320, 173 N. E. 372; *Gidley vs. Chicago Short Line R. Co.*, 346 Ill. 122, 178 N. E. 400; *Lavigne vs. Chicago, M., St. P. & P. R. Co.*, 287 Ill. App. 253, 4 N. E. (2d) 785; *Mitchell vs. Louisville & Nashville R. Co.*, 194 Ill. App. 77. There is no local rule of practice contrary to the universal rule in both federal and state courts on the subject and, even if there were, it could not abridge a substantive right under the F. E. L. A.

Nor is there any presumption in Illinois that the commerce was intrastate. The case of *C., R. I. & P. R. Co. vs. Industrial Board*, 273 Ill. 528, was under the Workmen's Compensation Law. It held that the burden was upon the railroad company to show the nature of the commerce, and, sustaining the award, that where plaintiff made out a *prima facie* case, the burden was upon the railroad company to show whether the cars were interstate or intrastate. The court assumed the work was intrastate because of the failure of the railroad company to show that it was interstate.

Respondent's counsel attempts to distort this decision into a general presumption in favor of the intrastate character

of the work, contrary to the express holding of this Court in *Philadelphia and R. R. Co. vs. Polk*, 256 U. S. 332, that, "The presumption, indeed, might be the other way."

Apparently respondent's counsel are willing to induce a belief in this Court that train 93 originated at St. Genevieve, Missouri. Apparently respondent's counsel are willing to permit this Court to believe that car PTX-4741 may have originated in St. Genevieve, Missouri. In the ultimate outcome it should make absolutely no difference, but for the sake of truth and accuracy we must again quote the undisputed testimony of Conductor Maddock which will be found on page 25 of the record, when he was referring to cars that his engine was hauling at the time of the accident:

> "This is a list of the cars that came over from the M. & I. and which were brought in by train 93, that is, the M. & I. that comes into St. Genevieve from Illinois. Conductor Rehm brought that train in."

This quotation is from the abstract of record prepared by respondent and filed in the Appellate and Supreme Courts of Illinois.

We reiterate our position that if PTX-4741 be completely eliminated from this picture, the general duties of Avance, as well as his work on the occasion of the accident, would not only justify but require a decision as a matter of law that he comes under the protection of the F. E. L. A. as amended in 1939. His general work was interstate. On the morning of the accident the crew had switched interstate cars and made an interstate delivery. At the very moment of the accident they were making up an interstate train.

The Supreme Court expressly stated that when the train left Bismarck, "only PTX-4741 was interstate" (R. 84). Counsel place great reliance upon the fact that only PTX-4741 was interstate. Again let us quote the testimony of Conductor Maddock, undisputed, as it appears in the record on page 25: "Leaving Bismarck that day according to the

wheel report, among the eleven cars that we had, two of them were going to Texarkana, Texas or Arkansas."

CONCLUSION

On January 3rd, 1944, this Court held that a night watchman in a veneer factory operated only in the daytime had such a close, immediate and necessary connection with the production of goods for commerce that he came within the scope of Congressional power. *Walton vs. Southern Package Corp.*, 64 S. Ct. 32. It would be impossible in any system of jurisprudence, however strange or perverse, to reconcile that decision with the one here under review.

Respectfully submitted,

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vs.
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Respondent.
No. 324.

MOTION BY RESPONDENT.

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MOTION BY RESPONDENT.

Motion by Respondent to Include in and Print as a Part of the Transcript of the Record in This Cause Portions of the Record of the Supreme Court of Illinois and Excerpts of Briefs of the Parties in Said Court.

Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, respondent, in the cause above entitled, respectfully shows to the Court:

1. Prior to the filing of the transcript of record in this Court, Harry M. Avance, the petitioner, did not serve on respondent a praecipe designating the matters to be included in said transcript of the record.

2. Said transcript of record did not include the complete transcript of the proceedings on the trial of this case which were then on file with the Clerk of the Supreme Court of Illinois, but included only the printed abstract thereof.

3. There was included in such transcript of the record, as filed in this Court, excerpts from the briefs of the parties in the Supreme Court of Illinois (R. 78-79).

4. The abstract of the record filed in the Supreme Court of Illinois certified to this court and here printed as the "Transcript of Record," at one place erroneously refers to "Train 93" as "the M & I that comes into Ste. Genevieve from Illinois" (R. 25-26). Such reference in the abstract is in error and such error is in part the basis of petitioner's claim that the Supreme Court of Illinois acted in bad faith. Petitioner quotes and places great reliance on this error. See his Petition at pages 16 and 27; and his Reply Brief at page 5. The original record does not so read, reading that the train came in "From Ste. Genevieve, Missouri." A certified copy of the typewritten pages of the erroneously abstracted testimony being a part of the record of the Supreme Court of Illinois, namely pages 115 to 121 inclusive of said record, has been certified by the Clerk of the Supreme Court of Illinois and lodged with the Clerk of this court.

5. Such error in the abstract was called to the attention of the Supreme Court of Illinois by paragraphs 2, 3 and 4 on page 20, and paragraphs 1, 2 and 3 on page 21 of the Statement, Brief and Argument filed by the respondent in the Supreme Court of Illinois. The Clerk of said court has certified and there has been lodged with the Clerk of this court, a copy of such portions of said brief. The Clerk of the Supreme Court of Illinois has also certified and there has been lodged with the Clerk

of this court lines 6 to 9 inclusive of page 22 of the Statement, Brief and Argument of petitioner here in the Supreme Court of Illinois.

6. Inasmuch as such portion of the abstract of the record filed in the Supreme Court of Illinois is in error, and such error is here in part made the basis for challenging the good faith of the Supreme Court of Illinois; and inasmuch as such error was called to the attention of that court, the transcript of the record as here printed and considered should fairly be supplemented and expanded by including therein pages 115 to 121 inclusive of the record of the Supreme Court of Illinois, and the excerpts of the briefs of the parties above referred to, filed in the Supreme Court of Illinois.

Wherefore, this respondent moves that the certified copies of that portion of the transcript of the record of the Supreme Court of Illinois and of the briefs filed in the Supreme Court of Illinois, which have hereintofore been referred to, and which are now lodged with the Clerk of this court, be included in the transcript of the record to be considered here; and that the Clerk of this court be directed, at respondent's expense, to print and attach the same to the printed transcript of the record in this cause.

GUY A. THOMPSON, Trustee,

MISSOURI PACIFIC RAILROAD COMPANY,

By JOSIAH WHITNEL,

510-17 First National Bank Building,

East St. Louis, Illinois,

Attorney.

State of Illinois, }
County of St. Clair. } ss.

Josiah Whitnel, first being duly sworn on oath, states he is counsel for the respondent in the cause above entitled, that he is familiar with the transcript of the record in this cause now on file in the Supreme Court of the State of Illinois, and with the briefs of the parties filed in that court. This affiant further states that he has read the foregoing motion and that the matters therein stated are true in substance and in fact.

Josiah Whitnel.

Subscribed and sworn to before me this 18th day of September, 1944.

Rose Mary Neal,
Notary Public.

(Notary Seal)